74-1252

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1252

EDWARD WRAY CROCKETT, JR., EDWARD WRAY CROCKETT, III., PLEASANT HENRY PARTIN, MARCUS RANDOLPH MARTIN, ROWEN EUGENE BROWN, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on January 17, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and is reprinted in Appendix A hereto, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on January 17, 1975. The Court of Appeals permitted the petition to be filed out of time but denied it on March 4, 1975. Appendix B, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Were petitioners who were charged with conducting an illegal gambling operation at an Eagles Club in violation of 18 U.S.C. 1955 denied a fair trial when counsel for six of the defendants testified as a government witness and invoked the Fifth Amendment when questioned about gambling at the Club.

2. Did the Court direct a partial verdict of guilty on the charge of violating 18 U.S.C. 1955 and conspiring to violate that Statute by charging the jury "that the operation of a commercial gambling establishment is in violation of Georgia law" without telling them what the Georgia law said.

3. Whether petitioners' convictions of conspiracy represent a duplication of their convictions of violating 18 U.S.C. 1955 and require that the conspiracy convictions be reversed.

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix C hereto, *infra*.

STATEMENT OF THE CASE

Defendants were charged with conspiring to violate 18 U.S.C. 1955 and with a substantive violation of 18 U.S.C. 1955.

During the course of trial before the Honorable J. Robert Elliott and a jury, Attorney H. B. Edwards, Jr., who represented petitioners Marcus Randolph Martin, Edwin Eugene Brown and four other defendants, was called as a witness by the government. Mr. Edwards, Jr. was first asked about the operation of the Eagles Club where the alleged illegal gambling took place and he testified extensively in that area. He then was asked a question about the alleged illegal gambling activity at the Club and he replied, "I wish to take the Fifth Amendment. Any evidence I give might incriminate me in some regard." After an unreported side bar conference, Mr. Edwards, Jr. withdrew his claim of privilege and testified at length about gambling activity at the Club. When he completed his testimony, Mr. Edwards, Jr. resumed his role as defense counsel.

In charging the jury on the necessary elements of a violation of 18 U.S.C. 1955, the Court told the jury that they must find a violation of Georgia law but did not read or even paraphrase the Georgia statutes that defendants allegedly violated, but rather instructed the jury that, "I am just going to tell you, as a matter of law, that the operation of a commercial gambling establishment is in violation of Georgia law."

Petitioners Edward Wray Crockett, Jr. and Pleasant Henry Partin were convicted on both counts. Petitioners Edward Crockett, III., Edwin Brown and Marcus Martin were found not guilty on Count One, guilty on Count Two.

REASONS FOR GRANTING THE WRIT

I. Petitioners Were Denied a Fair Trial When One of the Defense Lawyers Was Called as a Prosecution Witness and Invoked the Fifth Amendment.

Petitioners contend that they were denied a fair trial when one of the defense lawyers was called to testify for the government, against the defendants, and in the course of so testifying invoked the Fifth Amendment in response to a question.

Petitioners were charged with operating an illegal gambling business at an Eagles Club in Valdosta, Georgia, where Attorney H. B. Edwards, Jr. had held various offices over a period of years. Mr. Edwards, Jr.'s relationship with the Club terminated approximately two months before Petitioners were indicted.

The Court of Appeals held that as a general rule, a party's attorney should not be called as a witness unless his testimony is both necessary and unobtainable from other sources, but found that Mr. Edwards' testimony met these requirements.

Obviously troubled, however, by what it termed the "conspicuous" and "overwhelming" impropriety of a defense lawyer testifying against his clients, the Court further found that even if it was error to admit the testimony, it was harmless error.

The general rule relied on by the Court is inapplicable to the instant situation, however, because it is based upon cases where a lawyer is testifying on behalf of his client or where a lawyer calls the prosecuting attorney as a witness for his client, and not where the prosecution calls the accused's counsel as a prosecution witness.

There is no general rule governing the latter situation and, in fact, only two reported cases which have previously considered the question.[1]

The case here is further complicated by the fact that counsel not only testified for the prosecution but also invoked the Fifth Amendment during the course of that testimony. There are no reported cases dealing with that situation.

In trying to apply the rule evolved to deal with the case of a lawyer testifying on behalf of his client to one where a lawyer testifies against his clients and also invokes the Fifth Amendment to the detriment of all defendants, the Court of Appeals became enmeshed in several irreconcilable holdings.

The Court held that any error caused by the testimony was harmless because it was not incriminating as to any defendant and because the other evidence of a gambling operation was overwhelming.

But if the other evidence of the illegal gambling operation was so overwhelming that admitting Mr. Edwards' testimony was harmless error, it could not have been "clearly necessary" to the government's case. And if it showed that defendants had conducted, managed, financed, supervised, directed or owned all or part of an illegal gambling business as the Court said it did, it certainly incriminated them.

The government had the obligation to show and directed its efforts to prove that the activity at the

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[1] *People* v. *Lathrom*, 192 Cal. App. 2d 216, 13 Cal. Rptr. 325, 88 ALR 2d 785 (1961), and *Gunther* v. *United States*, 97 App. D.C. 254, 230 F.2d 222 (1956), both of which held that it is improper and an invasion of the right to counsel to call an accused's attorney as a government witness.

Eagles Club was illegal. Can it be doubted that when one of the lawyers for the defendants, with the unique knowledge of the facts of the case that a jury would naturally attribute to him, refused to testify about gambling at the Club because it might incriminate him, that the jury were convinced that the activity was, in fact, illegal? It was impossible for Petitioners to receive a fair trial under those circumstances.

The question presented is so fundamental to a defendant's right to a fair trial and the Court of Appeals ruling so foreign to that right that this Court should, in the exercise of its power of supervision, reverse petitioners' convictions.

II. The Court Directed a Partial Verdict of Guilty on Counts One and Two.

Petitioners were charged with conspiring to violate 18 U.S.C. 1955 in Count One of the indictment and with violating 18 U.S.C. 1955 in Count Two.

18 U.S.C. 1955 proscribes the operation of an illegal gambling business which is defined in part as one which "is a violation of the state or political subdivision in which it is conducted."

In instructing on the elements of this offense, the Court did not read or even paraphrase the state law which the indictment charged defendants with violating, but rather charged the jury that, "I am just going to tell you, as a matter of law, that the operation of a commercial gambling establishment is in violation of Georgia law."

The Court of Appeals recognized that this instruction standing alone might have given the jury the erroneous impression that the issue of state law violations

was foreclosed from their consideration, but held that the error was corrected by the Court adding:

> "[T]he prosecution . . . ha[s] to prove that it is a violation of the law of the state. Well, I have already charged you that the law of the state of Georgia prohibits commercial gambling enterprises. Now, second, I expressed no opinion about this one way or the other because you are the sole judges of the facts. I am telling you what the law is but you are the sole judges of the facts." (Emphasis Court's)

It is respectfully submitted that this instruction did not cure the error because, while telling the jury they were the judges of the facts, the Court at the same time took away from them the question of whether or not the defendants operated or participated in the earnings of a gambling place. The Court did not tell the jury that they had to find that defendants operated or participated in the earnings of a gambling place before they could find a state law violation, but rather that if they believed the government's evidence, there was a state law violation. The Court thus made the essential determination that defendants operated or participated in the earnings of a gambling place.

It was essential to the government's case that they prove a violation of Georgia law. The Court's instruction decided this material fact as a matter of law adversely to those accused and as such must be regarded as a partial directed verdict of guilty. This is prohibited by the law of the Fifth Circuit as well as prior holdings of this Court. See *Mims* v. *United States*, 375 F.2d 135, 5th Cir. 1967, *Bollenbach* v. *United States*, 236 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350, 1946.

The question presented to the Court is important because the effect of the instruction was to deny the defendants the right to have their guilt or innocence determined by a jury as guaranteed by the Sixth Amendment. Petitioners, therefore, respectfully urge this Court to reverse their convictions.

III. It Is Improper To Prosecute and Punish Under Both 18 U.S.C. 371 and 18 U.S.C. 1955 in Light of Wharton's Rule.

The Court granted certiorari in *Ianelli* v. *United States,* No. 73-64, on May 28, 1974, on the question of whether it is improper to prosecute and punish under both 18 U.S.C. 371 and 18 U.S.C. 1955 in light of Wharton's Rule. The case was argued before the Court on December 17, 1974. It is suggested that the Court defer disposition of this petition until after the decision in *Ianelli* v. *United States* or it may wish to grant the petition now and join it with *Ianelli.*

CONCLUSION

It is respectfully submitted that certiorari should be granted as to the first point raised in this petition because a grant in this case would result in a determination of the right of the government to call defense counsel as a prosecution witness. The ruling of the Court below is so foreign to existing notions of due process that a final determination of the question is of great importance.

Certiorari should likewise be granted as to the second point because the ruling of the Court below invades a defendant's right to a trial by jury.

It is of great practical importance to have a final determination as to how far a court can go in taking

questions away from a jury and deciding them as a matter of law.

On the third question, certiorari should be granted because of the Court's grant of certiorari in *Ianelli* on the same question.

Respectfully submitted,

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